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COPYRIGHT IN THE AGE OF DISRUPTION

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I. Introduction

On 14 November 2022, Director General of the World Intellectual Property Organization ("WIPO"), Mr Daren Tang, delivered the keynote address at the Asian Pacific Copyright Association ("APCA") Conference held at the Bukit Timah Campus of NUS Law. The conference was held in hybrid mode, attracting participants from over a dozen countries that spanned Austria to Australia. Co-hosted by the EW Barker Centre for Law & Business and the Centre for Technology, Robotics, AI & the Law ("TRAIL"), the theme of the conference was "Copyright in the Age of Disruption". Over two dozen papers and presentations discussed how copyright law should address myriad disruptive phenomena such as the evolving use of artificial intelligence, the ascendancy of cultural appropriation concerns, the creation of the metaverse, new communication technologies, NFTs and fast fashion.[1]

Speaking via Zoom from Geneva, Mr Tang commented that the theme was a "timely and timeless one", and said: "fast-moving industries from AI to eSports have clear copyright dimensions. Indeed, in many cases, such as the metaverse, IP rights are integral to establishing and upholding the legal framework on which the sector will stand."[2] He concluded that: "just as it has done in the past, the academic community has a key role to play in informing debate and developing new and forward-looking solutions. Indeed, in many ways, the future of copyright begins at conferences like this – open and collaborative forums where ideas can be presented, tested and discussed."[3]

II. Featured Papers

Two papers have been selected for publication in this special conference feature of the *Singapore Journal of Legal Studies* following peer review.

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[1] "Copyright in the Age of Disruption", *2022 Conference of the Asian Pacific Copyright Association* <https://law.nus.edu.sg/ewbclb/apca2022-home/>.

[2] *Ibid*.

[3] *Ibid*.

Dr Cheryl Foong, in 'Copyright's Making Available Right: Distinguishing Downloads and Streams under the WIPO Internet Treaties',[4] critically analyses the Supreme Court of Canada's 2022 decision in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*[5] (*SOCAN v ESA*), arguing that despite some misgivings, Canada is nonetheless meeting its international obligation under the WIPO Internet Treaties which requires that copyright owners be granted the exclusive right to authorise 'the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them'.[6] The important question that *SOCAN v ESA* raises is whether authorisation of an exclusive right such as reproduction sufficiently protects the 'making available' right. According to Foong, an explicit 'making available' right is necessary as the Berne Convention[7] left open a number of ambiguities: (1) at whose impetus the transmission must occur; and (2) whether 'the public' to which the work is communicated must receive the work at the same time, or whether they may be separated in time. The new 'making available' right was revolutionary when the Internet Treaties were concluded in 1996 through a diplomatic conference involving over 130 countries, as it made irrelevant whether copies of a work were made available or whether the work was simply 'made perceptible' to users. However, under the umbrella solution devised by Mihály Ficsor, former Assistant Director General of WIPO, national legislatures were not required to implement the communication right in the form stated in the Internet Treaties. Even if enacted in the same form, national courts are not required to interpret their communication right in the same manner as understood under the Internet Treaties. With respect to Canada, the relevant consideration therefore is the substantive protection afforded to copyright owners *as a whole* in Canada and whether that meets the Internet Treaties' requirements. Foong concludes that while the Internet Treaties may not distinguish downloads or streams from the 'making available' right, member states nevertheless have the freedom to determine how downloads or streams are protected nationally, either under a communication right or combination of protections, so long as the right to make available to the public is protected in substance. In essence, the flexibility afforded by the umbrella solution permits different jurisdictions to adopt various forms of protection that preserve copyright law's ability to evolve alongside technologies and to adapt appropriately to specific national contexts.

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4 Cheryl Foong, "Copyright's Making Available Right: Distinguishing Downloads and Streams under the WIPO Internet Treaties" [2023] Sing JLS 232-255.

5 *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association* [2022] S.C.J. No. 30 (Can).

6 WIPO Copyright Treaty (20 December 1996), 36 ILM 65 (1997), art 8 (entered into force 6 March 2002, accession by Singapore 17 January 2005) <https://www.wipo.int/wipolex/en/text/295157>; WIPO Performances and Phonograms Treaty (20 December 1996), 36 ILM 76 (1997), arts 10, 14 (entered into force 20 May 2002, accession by Singapore 17 January 2015) <https://www.wipo.int/wipolex/en/text/295477>.

7 Berne Convention (24 July 1971), 828 UNTS 221, (entered into force 19 November 1984, accession by Singapore 21 September 1998) <https://www.wipo.int/wipolex/en/text/283693>.

In 'Algorithmic Enforcement of Copyright: Approaches to Tackle Challenges Posed by Upload Filters',[8] Professor Philipp Homar analyses the extent to which online platforms are required to use filtering tools to detect and block infringing uploads, and evaluates the present legal approaches to mitigate risks of over-enforcing copyright in the digital age. Although algorithmic enforcement of copyright seems to be a global trend, the legal framework from which the use of filtering software emerges differs across jurisdictions. From the perspective of copyright law in the United States ("US"), algorithmic enforcement is rooted in the "notice and takedown" system that was designed by the Digital Millennium Copyright Act.[9] The European Union ("EU") is currently at the forefront of the development of algorithmic enforcement of copyright law, both with regard to requiring platforms to use filter tools (Art 17 of the Directive on Copyright in the Digital Single Market[10] ("DSM-Dir")) and in respect of mitigating risks that result from it, especially through the newly adopted Digital Services Act.[11] Article 17 of the DSM-Dir establishes an obligation for Online Content-Sharing Service Providers ("OCSSPs") to review that the content uploaded by users is legal, otherwise they would be liable. When users upload content, the OCSSPs are performing an act of communication (or making available) to the public, content that might be protected by copyright. Online platforms which allow users to upload digital content, such as Facebook and YouTube, can be held liable if that content infringes copyright. To avoid liability, Article 17 requires OCSSPs to "best efforts" to either obtain a license for the material or block unauthorised content. They should also act expeditiously once appropriately notified by a rightsholder to remove or disable unauthorised content and exercise best efforts to prevent future uploads. Through comparing approaches in the US and the EU, he concludes that despite the shortcomings of algorithms in detecting infringing uses and distinguishing them from permissible uses, it is far from certain that broad-scale over blocking is an inevitable consequence of the developments in the EU. It appears that the implementation and enforcement of Art 17 of DSM-Dir has not turned out to be the feared censorship machine. Nonetheless, computer scientists, representatives of myriad stakeholders, and legal scholars should continue to carry out research on how algorithms can be designed to meet the legal requirements, how they can be implemented in a way that appropriately balances the interests of rightsholders, users and platform providers, and which legal provisions are required to govern this process.

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8 Philipp Homar, "Algorithmic Enforcement of Copyright: Approaches to Tackle Challenges Posed by Upload Filters" [2023] Sing JLS 256-282.

9 Digital Millennium Copyright Act 17 USC (US) (1998).

10 Directive on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, EC Council Directive 2019/790, Art 17, Doc 32019L0790, [2019] OJ L 130/92 at p 119 <https://eur-lex.europa.eu> [DSM-Dir].

11 Regulation on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), EC Regulation 2022/2065, Doc 32022R2065, [2022] OJ L 277/1 <https://eur-lex.europa.eu>.

III. Post-Conference – Generative AI and Copyright

It was around the start of 2023, when this special feature was being put together, that generative artificial intelligence ("AI"), in particular a kaleidoscope of issues raised by ChatGPT, Dall·E and other applications, catapulted into the public consciousness through widespread international media coverage about their impact on different aspects of our lives. Issues that pertain to transparency and safety, education and school assessments, personal privacy and surveillance, as well as the creation of new business models have begun to attract the attention of national legislatures and regulators around the world. Generative AI is also having a significantly disruptive impact on copyright laws.

While the debate on whether autonomous AI-generated works deserve copyright protection appears to have taken a backseat,[12] the present legal issues with programmes that can produce essays or create realistic images and art from a description in natural language text prompts, are very much occupying the centre stage in copyright law discussions. These sophisticated AI technologies, which train on vast quantities of authorial works to generate new content in response to text prompts, are often described as "generative AI", and the manner in which these copyright-protected works are employed in training the AI, have attracted a number of high-profile lawsuits since the start of 2023.[13] There is certainly a swell of public interest in what ChatGPT can deliver, whether in assisting students with writing school assignments or in generating scam emails. The temporary ban of ChatGPT by Italy in April 2023, albeit over privacy concerns, has precipitated studies in other European countries.[14] The new GPT-4 by OpenAI, touted to be revolutionary in how it can respond to both text and image commands, is available for a modest fee of US$20 a month to ChatGPT Plus subscribers in the United States.

Regarding generative AI, two fair use factors that are likely to carry the greatest weight in the analysis are: (1) what is the purpose/character of the use, namely whether the use by generative AI is "transformative", *i.e.*, changes the purpose or the nature of the original work in some way; and (2) what is the impact of the generative AI's use on the market, *i.e.*, does it threaten the livelihood of the original creator by competing with their works or the licensing market for their works? ChatGPT, Stable Diffusion and many other comparable AI applications are not search engines of the kind that the US Second Circuit Court of Appeals found to be transformative

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[12] For a comprehensive analysis, see Wee Liang Tan & David Tan, "AI, Author, Amanuensis" (2022) 5(2) Journal of Intellectual Property Studies 1. The United States Copyright Office has also released an authoritative statement of policy rejecting any registration of copyright for works created without any human contribution: Copyright Office, "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence" 37 CFR Part 202 (16 March 2023) <https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf>.

[13] See *eg*, *Tremblay et al v Open AI*, Case 3:23-cv-03223 (filed 28 June 2023) (N.D. Cal); *Getty Images (US), Inc v Stability AI, Inc*, Case 1:23-cv-00135-UNA (filed 3 February 2023) (D. Del.); *Andersen et al v Stability AI Ltd et al*, Case 3:23-cv-00201 (filed 13 January 2023) (N.D. Cal.); *Silverman et al v OpenAI*, Case 3:23-cv-03416 (filed 7 July 2023) (N.D. Cal.).

[14] Supantha Mukherjee, Elvira Pollina & Rachel More, "Italy's ChatGPT ban attracts EU privacy regulators", *Reuters* (4 April 2023) <https://www.reuters.com/technology/germany-principle-could-block-chat-gpt-if-needed-data-protection-chief-2023-04-03/>; Shiona McCallum, "ChatGPT banned in Italy over privacy concerns', *BBC* (1 April 2023) <https://www.bbc.com/news/technology-65139406>.

in *Authors Guild v Google*.[15] A number of them are highly successful commercial enterprises, with Stability AI valued at US$1 billion, and some charging a user fee for their services. There is also little transformative purpose to be found as the AI would be accessing and reproducing the creative expression in these works in the outputs, *i.e.*, the works would have been appropriated for their creative elements rather than their underlying facts.

Generative AI systems are trained essentially with existing creative works and then they simply remix them to derive more works of the same kind based on our text prompts. Depending on the text prompts, some generative AI systems may be reproducing certain copyright-protected works without the requisite degree of transformativeness that will tilt the first factor in favour of fair use. ChatGPT's replies to our text prompts are not based on a process of reasoning akin to human comprehension; they are based on the probabilities of certain words occurring together, and may generate paragraphs of text from copyrighted literary works in its response. Based on the US Supreme Court's most recent decision on fair use handed down on 18 May 2023 in *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith* ("*Warhol*"), if an original work and secondary use share the same or highly similar purposes, and the secondary use is commercial, the first fair use factor is likely to weigh against fair use, absent some other justification for copying.[16] In that case, the use was Andy Warhol Foundation's ("AWF") commercial licensing of Warhol's Orange Prince (which was based on Lynn Goldsmith's original photograph) to appear on the cover of Condé Nast's special commemorative edition. The purpose of that use was to illustrate a magazine about Prince with a portrait of Prince, and an infringing work that portrays Prince somewhat differently from Goldsmith's photograph (yet has no critical bearing on her photograph) was insufficient for the first factor to favour AWF, given the specific context of the use. The majority emphasised: "[t]o hold otherwise would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals. As long as the user somehow portrays the subject of the photograph differently, he could make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use."[17] Last but not least, such 'unrestricted and widespread' conduct would have a substantially adverse impact on the licensing markets of these copyrighted works.[18]

Under the DALL·E Content Policy help section of OpenAI's website, it was stated that "[s]ubject to the Content Policy and Terms, you own the images you create with DALL·E, including the right to reprint, sell, and merchandise – regardless of whether an image was generated through a free or paid credit."[19] If the majority's decision in *Warhol* is followed, this assignment of copyright to the user (assuming there is copyright in the output to begin with) would likely supplant demand for the

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[15] *Authors Guild v Google*, 804 F 3d 202 (2nd Cir 2015). *Contra VHT Inc v Zillow Group Inc*, 918 F 3d 723 (9th Cir 2019).

[16] *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith*, 598 U.S. __ (2023) (Slip Opinion, 18 May 2023) at 18–20.

[17] *Ibid* at 33.

[18] *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [84].

[19] OpenAI, "Can I sell images I create with DALL·E?" <https://help.openai.com/en/articles/6425277-can-i-sell-images-i-create-with-dall-e>.

original work and even though not perfect substitutes, the licensing market for the original or its derivatives would be adversely impacted. On a cursory review, it is unlikely fair use.

As we continue to witness increasing disruptive innovation over the next few years, I am confident that we will be treated to a plethora of scholarly works in this area–hopefully authored by human individuals–but in the meantime, do enjoy the articles curated here for you.